

**USA V Sorn 04-16103****MAY 03 2006**

WALLACE, Circuit Judge, dissenting in part,

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

I agree with the majority that the judgment of the district court must be reversed. I respectfully dissent, however, from the majority's decision to award benefits to the petitioner outright. The majority's decision "is still another example of this court's insistence that it be the ultimate trier of fact in social security disability cases." *Holohan v. Massanari*, 246 F.3d 1195, 1211 (9th Cir. 2001) (Fernandez, J., dissenting in part).

When a court of appeals reverses an administrative determination, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *INS v. Ventura*, 537 U.S. 12, 16 (2002). This circuit has chosen to expand this "rare circumstances" direction, and held that a remand awarding social security benefits can be appropriate, apparently regardless if rarely applied, where "(1) the ALJ failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (citations omitted). Even these expanded criteria are not met in the case at hand.

In my view, there are several issues that should be clarified on remand before benefits are awarded. My first area of concern is with Sorn's treating physician's medical report dating from 2000, which appears to have been filled out jointly by the physician and by a clinical social worker who had given Sorn therapy. While the Commissioner is obliged to give deference to the opinion of a treating physician, *see Holohan*, 246 F.3d at 1202-03, the Commissioner is allowed "to accord opinions from other sources less weight than opinions from acceptable medical sources." *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). Social workers are listed as "other sources" by the Code of Federal Regulations. *See* 20 C.F.R. § 416.913(d)(3). Thus, I would remand to allow fact-finding as to how much of the medical report was the work product of the physician and how much was the work product of the social worker.

Secondly, Sorn seemed to be improving at the time of the administrative ruling. In 2001, the social worker himself indicated that Sorn "had accomplished all that she had in mind to accomplish in psychotherapy," and there had been "a decrease in the level of depression and in the level of confusion and an increase in her ability to remember and to understand and respond to conversation." I would remand to allow the administrative judge to examine whether Sorn had improved

further in the five years that have elapsed since the last medical report in the record.

Finally, “[i]n cases where the testimony of the vocational expert has failed to address a claimant's limitations as established by improperly discredited evidence, we consistently have remanded for further proceedings rather than payment of benefits.” *Harman v. Apfel*, 211 F.3d 1172, 1180 (9th Cir. 2000). Although we have awarded benefits rather than remanding for further proceedings “in the unusual case in which it is clear from the record that the claimant is unable to perform gainful employment in the national economy,” *Benecke*, 379 F.3d at 595, this is not such a case. I would allow the vocational expert to consider Sorn’s mental impairment before determining whether she is capable of work. I conclude that the ruling of the majority is in conflict with *Benecke*.

“[I]t is one thing to find error; it is quite another to decide that the trier of fact, the expert agency, and the district court have perceptions of the record so inferior to ours that benefits must be ordered with no further ado.” *Holohan*, 246 F.3d at 1211 (Fernandez, J., dissenting). We should let the agency decide any outstanding issues in the first instance. *See Ventura*, 537 U.S. at 16. Accordingly, I respectfully dissent from the part of the majority ruling that remands for an award of benefits.